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IN THE

Supreme Court of the United States

October Term, 1966

No. 625

In the Matter of

THE PETITION OF HANS-OLA T. MALMSTEDT
FOR THE ADOPTION OF A MINOR

Hans-Ola T. Malmstedt, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review a judgment of the Court of Appeals of Maryland entered against the Petitioner, in an adoption proceeding brought by him, in which judgment Petitioner was denied adoption of his own natural child, an infant girl aged 21 months.

OPINIONS BELOW

The majority opinion of the Court of Appeals of Maryland and the dissent (R. 6-14)[1] are reported at 243 Md. 92, 220 A.2d 147 (1966). The opinion and decree of the trial Court, the Circuit Court for Montgomery County (E 91-94, E 96-97, E 97-101) are not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland (R. 15) was entered on June 6, 1966. A timely Motion for Extension of Time to File Petition for Certiorari was granted by this Court on August 22, 1966, extending through October 3, 1966, the time for filing a Petition of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether, under the equal protection clause of the 14th Amendment, a State can disqualify a father for adoption of his own natural child (and disqualify the child for the care of her father) on the ground that the child is illegitimate, when the legislative policy of the state's child-care laws opposes discrimination against this father and his child.

2. Whether, under the equal protection and due process clauses of the 14th Amendment, a state can, under any circumstances, disqualify a father for adoption of his own natural child (and disqualify the child for the care of her father) on the ground that the child is illegitimate.

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[1] The record before the Court of Appeals of Maryland is paginated with "R" prefixes. The Record extract of trial Court proceedings certified by the Clerk of the Court of Appeals, is paginated with "E" prefixes.

3. Whether, under the due process clause of the 14th Amendment, an infant can be deprived of a full hearing and the exercise of unfettered judicial judgment on the issue of what is in her best interest, by the intervention of the veto of a mother who otherwise declines to accept her own parental obligations, and the threshold disqualification of her own natural father as an adoptive parent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Maryland statutes are set out in Appendix D to the Petition.

STATEMENT

This case is a novel one for this Court. The facts, however, are as old as time.

Petitioner and the Respondent-Mother[2] were

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[2] The natural mother of the child and the Church Mission of Help of the Diocese of Maryland were granted intervention below and, as indicated, *infra*, took positions adverse to the Petitioner. The Church Mission is referred to hereinafter as "Respondent Church Mission." The natural Mother is referred to hereinafter simply as "Respondent Mother" to protect her identity. The opinions below did not state the name of the Respondent Mother. The briefs and record extract did, but were sealed and access to them was restricted to the Court and Counsel by order of the Court of Appeals.

childhood friends for many years before the baffling event of their becoming unwed parents confronted them (E30). Hans-Ola Toresson Malmstedt, the Petitioner, is the son of an officer in the Swedish Merchant Marine (E23, E30, E41). When the Petitioner's father was employed as a consultant for the Nicaraguan Government, the Petitioner met the Respondent-Mother, the daughter of a U.S. Foreign Service official stationed there (E30). The young Petitioner and the Respondent-Mother became close friends (E30). Both were bright and attractive youngsters from good families. They had much in common (E23-26, E30-31, E98-99).

When the Respondent-Mother went to school in Europe, the friendship became young love. The Petitioner's family moved from Nicaragua to the United States where the family intends to live permanently (E73). The family settled in Hanover, New Hampshire, and the Petitioner began high school in Hanover and later attended the University of New Hampshire at Durham (E24, E42). The Respondent-Mother, whose family had returned to the Washington area, visited often at the Petitioner's home. She was warmly received by Petitioner's mother, who was very fond of her and who heartily approved of her friendship with her son (E31). The Petitioner and Respondent-Mother talked of marriage and had future plans for it. Meanwhile the Petitioner went on with his studies (E29, E31). He majors in languages and hopes to be an interpreter for the United Nations (E26, E43).

The Respondent-Mother then learned she was pregnant. There never has been any question that the Petitioner is the father of the child born to the two on January 25, 1965 (E3, E7, E29). When the Petitioner learned of the pregnancy, he wanted only one thing: to marry the Respondent-Mother immediately (E29, E31, E51). The Petitioner's mother, when she learned of the pregnancy and the plans

for marriage, approved, since she loved the Respondent-Mother, hoped to welcome her into the Malmstedt family and planned to help the newlyweds to get established (E31). The Respondent-Mother, then at college in Boston, also planned for the marriage. The young people had gone to the point of securing a marriage license (E29, E31).

At some time during the fall of 1964 the Respondent-Mother changed her mind (E31). It is the position of the Petitioner that it was the Respondent-Mother's father who interfered to prevent the marriage (E31). The wisdom and desirability of marriage between these young people was attested to by the Investigator for the Circuit Court of Montgomery County, who conducted a thorough investigation of the Petitioner and his family in the proceeding leading to the Appeal (E38). He found the Petitioner still willing and anxious to marry the Respondent-Mother, not out of sense of duty alone, but because the Petitioner still loved her (E51). He also found the Petitioner's family a fine, sound one, living in circumstances that radiated wholesomeness and stability (E23-27). The soundness and stability of the Malmstedt family, both in material and moral terms, is accepted and has not been disputed by anyone in the proceeding. But Respondent-Mother, beginning in the fall of 1964, refused marriage and continues to do so. (E38, E98).

With marriage foreclosed, Petitioner then desired what to him was the most natural thing in the world. If the Respondent-Mother was not going to keep the baby (as she very early decided and announced), Petitioner wished to raise his own baby. At the outset, Respondent-Mother and her parents were sympathetic with this and agreed to allow the baby, when born, to be taken by Petitioner and raised in his parents' home at Hanover until Petitioner finished school and had a home of his own (E32-33, 44-46). The Petitioner would be living during the school year

at Durham, New Hampshire only 95 miles away from Hanover and would be able to see his baby each weekend. Petitioner's father would be with his grandchild on his frequent leaves home. Shortly, however, after Respondent-Mother finally refused marriage, she also announced that she would refuse to allow Petitioner to take the baby after its birth and raise it (E73-4). In consequence, Petitioner, whose baby was given the Malmstedt name by the Respondent-Mother, has never been permitted to see his child or even to know where it is being cared for while these proceedings go on (E92).

When the baby was born, on January 25, 1965, it was taken within a week to the Church Mission of Help for the Diocese of Maryland, Inc. ("Respondent Church Mission") where arrangements had been made prior to the birth for foster home care until outside adoptive parents could be secured and approved by the Respondent Church Mission, and legal proceedings for adoption by these outsiders completed (E30, E38, E89-90). When Petitioner's Petition for Adoption was filed, 36 days after the child's birth, in the Circuit Court for Montgomery County, all steps leading to adoption by outsiders were suspended pending the outcome of this proceeding (E50, E90).

The Respondent-Mother, herself, has persisted in her determination not to raise this child. She has not seen nor cared for the child since it was three days old and insisted and insists on adoption by strangers. She has admitted so in her Answer to the Petition (paragraph 3 thereof, E7). The Respondent Church Mission has admitted that it has had sole care of the child since its third day (E8, and Finding of Fact by the Chancellor, E12), and that it will dispose of the child to outside adopters (Answer of Respondent Church Mission, E15, and also testimony at E83).

Both the witness for the Church Mission (E22), and the Respondent-Mother herself (E89-90) testified that adoption by outsiders was still intended for this baby and was halted solely by the filing of the Petition by the present Petitioner, the baby's father. The Respondent-Mother was quite clear at trial that it remained her intention to dispose of the child to outsiders, through the Church Mission (E90). Her sole other interest with regard to this child is to defeat the infant's adoption by its father. (Answer of Respondent-Mother to Petition, paragraph 3, E7). She has not cared for it, nor seen it since it was first put in the care of the Church Mission three days after birth. (E30, E82, E89-90).

Petitioner not only has recognized this child, but has done everything to try and provide support for it, give it a name, and a home and the love that is in the instinct of the natural father (E3-4, E43). Respondent-Mother has refused and prevented this in every way available to her (E5-7, E89-90). Petitioner's family has joined with him in wholehearted support, both financial and moral, of his attempts to raise his own daughter once the child's mother declined to (E74), but these efforts, too, have been rejected and frustrated by Respondent-Mother in every way available to her.

At trial, the Trial judge (the Chancellor in equity under Maryland practice) based his decision on the fact that the consent of the natural mother had not been granted for adoption of this baby by his natural father. (E93 and the Chancellor's decree, E96).[3] The trial Court did discuss the Petitioner as a person, and his plans for the child (E92), but felt bound by the absence of the consent of the natural mother. (E93, 96). In its memorandum order (E100) the

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[3] The Chancellor's decree and memorandum Opinion and Order are attached to this Petition as Appendix C.

Chancellor also expressed an unwillingness to allow this child to be placed in a position where

> "knowing that she was adopted by an illegitimate father, would want to know why her mother did not want her, which, in reality, would be manifestly unfair to the mother."

In responding to Petitioner's contention that the best interests of the *child* were paramount and would best be served by adoption by the natural father, the Court, in its memorandum order again recited the legal bar posed by the absence of the mother's consent, but bespoke himself as follows concerning the child's future (at E100):

> ". . .a child should be placed in a family where there is a father and mother to give the child a normal family experience and who would love and raise her as their own."

The majority of the Court of Appeals disposed of the matter in much simpler style.[4] It dismissed the question of consent as being subsidiary to that of what it felt was in the best interests of the child. Although the majority recited certain facts concerning the Petitioner, it specifically refused to undertake consideration of his fitness as an adoptive parent and consequently made no findings on this issue. (R. 8). It rejected the only medical testimony (that of a child psychiatrist offered by the Petitioner, who found that among the various alternative futures open to this child, adoption by her father best served her future emotional health) as being based on short observation and inferior to "our own rather extensive experience in this particular field." (R. 10) The majority then sustained the Chancellor's decision with the following

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[4] The majority opinion of the Court of Appeals is attached to this Petition as Appendix A.

language, which contains the nub of the majority's views concerning this child's future: (at R. 11)

> "It should be apparent to all that through infancy, adolescence and young lady-hood it will be decidedly more advantageous to be raised in a normal, wholesome. home with a mother and father, than to be reared as an illegitimate child by the father alone, with the many potential, possible complexities and problems attendant to such a rearing."

To this one Judge (Horney, J.) vigorously dissented.[5] On the issue held so crucial by the majority, he found no legal bar present to prevent adoption by this father. He did not agree that adoption by strangers would "inevitably be in her best interests." (R. 13). Rather, he stated (R. 13):

> "The unusual circumstances of this case indicate that the natural father (who wants her) should have been permitted to adopt the child who, but for the callousness of the natural mother (who does not want her) would have been legitimized by the marriage of her parents."

Commenting on the majority's singular failure to consider the fitness of the father to raise his child, the dissent went on to emphasize the vital importance of the blood relationship in insuring devoted care and affection for this baby. It was the view of the dissent that no bar should be placed on adoption by a natural father (as had been imposed by the majority) and that the best interests of the baby in this case would be served by permitting her father to adopt her. (R. 13-14).

As a result of the majority opinion and agreement among all parties, the baby remains in a foster home selected by the Respondent Church Mission (but

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[5] The dissent is attached to this Petition as Appendix B.

not that of an adoptive family) until the present proceeding is completed.

REASONS FOR GRANTING THE WRIT

This case presents a unique constitutional question arising from the age-old problem of society's treatment of illegitimacy. Almost invariably in the past, society's problem has been that of the irresponsible, often fugitive father. As will be shown, much of the sparse law that has developed on this subject grew from this pattern of paternal abandonment. In the present case, however, we have an instance of near-extraordinary paternal concern and determination to provide for and raise an infant born out of wedlock. In the entire mass of American recorded cases there are only three isolated instances[6] in which the Courts have ever dealt with the father's attempt to adopt his illegitimate child. In all three the father succeeded. As a result, the issue posed before this Court now has never before been raised. The issue is, in its simplest terms, whether the father of an illegitimate child (here a little girl twenty-one months old) can be deprived of the right to raise the child, and whether the child can be deprived of her own father's care, simply and solely because the child is illegitimate. Because of this case's unique facts, and because in its present posture it embodies a benchmark decision which, as such, will surely influence other courts in adjudicating adoptions, the determination of the Maryland Court of Appeals should be examined most minutely for constitutional irregularities. Petitioner submits that these irregularities exist and have deprived him and his little daughter of the constitutional right to

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[6] See pp. 26, *infra*.

each other's love and care, as treasured as any right protected by law can ever be.

I. THE DECISION OF THE COURT BELOW DEPRIVES AN ENTIRE CLASS OF INFANTS OF THE LOVE AND CARE OF THEIR OWN FIT, CONCERNED NATURAL PARENTS (AND AN ENTIRE CLASS OF FIT, CONCERNED PARENTS OF THE RIGHT TO RAISE THEIR OWN CHILDREN) IN VIOLATION OF RIGHTS SECURED TO BOTH DEPRIVED PARENTS AND CHILDREN UNDER THE 14th AMENDMENT TO THE FEDERAL CONSTITUTION.

A. Both Petitioner and his Child have been denied equal, even-handed protection of the Maryland Adoption Laws.

At the outset it is essential to discern just what the majority of the Court of Appeals of Maryland ruled — and what it did not rule. In that Court's majority opinion, at R. 8, it stated:

> "The appellant seems to think that the trial judge found him unfit to raise a child. This is not true. It was unnecessary for the judge to reach that question, and we do not reach it either. Our only question is to determine what the welfare of the child demands.

The latter question was explicitly decided by the Majority in the following language (at R. 11):

> "It should be apparent to all that through infancy, adolescence, and young lady-hood it will be decidedly more advantageous to be raised in a normal, wholesome home with a mother and father, than to be reared as an illegitimate child by the father alone, with the many potential, possible complexities and problems attendant to such a rearing. It is

> obvious to us that the facts impelled the Chancellor's holding; consequently, we do not only find no reason to disturb his ruling, but state that had it been otherwise, we would have had to change it."

It is entirely clear that the majority of the Maryland Court based its decision, not on the fitness of the Petitioner, but on wholly separate considerations having to do with the fact of illegitimacy.[7] It is, indeed, quite clear what the majority had in mind. It concluded simply that raising this child as an illegitimate child was bad for the child, regardless of all other considerations of love, affection and natural instinct that favor a father's raising his own child. Most significantly, the test of fitness, that quantum of parental worthiness by which all other aspiring adoptive parents are measured, was denied the Petitioner. For him no test existed. Insofar as the Courts of Maryland were concerned, the Petitioner had excluded himself from the class of Petitioner's eligible to adopt by the very act of fathering the baby he now sought to raise. The Maryland statute makes no such exclusion.[8] But the majority of the Court of Appeals has very effectively written this exclusion into the law, both in Maryland and wherever else this decision may act as a precedent — unless the decision is reviewed and reversed by this Court.

Petitioner submits that the quoted portions of the opinion of the Court of Appeals represents the *ratio*

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[7] Nor does fathering an illegitimate child *ipso facto* render a father unfit in the eyes of the Court of Appeals of Maryland. The specific disclaimer of any determination of fitness precludes any such interpretation of the Court's views.

[8] "Any person over twenty-one years of age may petition the Court to decree an adoption . . ." § 70, Article 16, Annotated Code of Maryland, set forth in Appendix D.

decidendi of that Court's determination. There is much talk, in both the opinion of the Chancellor and Court of Appeals, of the single state of the Petitioner and his financial dependence on his family. Left alone, such language might defeat this attempt at federal intervention into the routine administration of state adoption laws. But the majority of the Court of Appeals determined not to leave these facts alone. It went farther, much farther, and seized on the accident of illegitimacy as the touchstone by which this father would be deprived of his child. It was the extremity of the decision that caused the ringing dissent by Judge Horney. And it is this very rationale that takes this case far beyond a simple exercise of judicial discretion into the area clearly marked out by this Court as constitutionally proscribed.

What Maryland has done in this case has been to bar from the consideration of its Courts *all Petitioners who seek adoption of their own illegitimate children.* The language of the opinion below permits no distinction between this Petitioner and any other father similarly situated. The married father of a child born out of wedlock would find no exception made for him by the Court of Appeals. For his married state would be considered, as in all adoption cases, as one ingredient of his fitness to adopt. This consideration the Court below has rendered, in its entirety, an irrelevancy in face of the Court's overweening horror of allowing a child to be "reared as an illegitimate child."[9] Petitioner submits that a fair reading of the opinion of the majority of the Maryland Court of Appeals leaves little room for

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[9] And since the majority pointedly refused to comment or make findings on the fitness of the Petitioner (R. 8), the majority's bar against adoption of an illegitimate child by its father logically disqualifies the fit father as fully as the unfit.

doubt that this case raises a threshold bar in Maryland, and wherever else it is followed, against adoption of an illegitimate child by its father. The position of the mother in this case, who declines to raise the child herself and wishes only to defeat this Petition so that unknown outsiders may adopt the child, is tangential to the heart issue of disqualification, touching it only because her objection served as the vehicle for articulation of the disqualification concept accepted by the Court of Appeals. Stripped of dicta, disqualification of the father of an illegitimate child to raise his child was what the Court of Appeals intended and quite explicitly accomplished.

Consequently, the Petitioner cannot be viewed alone. Coming before this Court in a benchmark case, he stands as the first of a class of potential Petitioners for Adoption, all of whom are both stigmatized and disqualified for parental duties and rewards by the single fact of having conceived a child out of wedlock. In a very precise sense, the Adoption Laws of Maryland, which do not discriminate on their face against any Petitioner [10] or group of Petitioners, have been administered in this case (and will be in the future, absent review by this Court) in a manner carefully designed to exclude this entire class of Petitioners from judicial consideration as adoptive parents. Whatever else may be true about this class of Petitioners, whatever virtues as parents they may have, whatever their "fitness" may be, they are barred. Their fitness can never enter the scales of judgment by which Chancellors in Maryland dispose of the future of adoptive children. These Petitioners are denied the equal administration and protection of the adoption laws of the State of Maryland under circumstances uniquely agonizing to them as human beings. And what is even more important in this

[10] See who may petition, under § 70, Article 16, Appendix D.

case, the infant girl (and other illegitimate infants similarly situated in the future) are also victims of unequal protection of the adoption laws of Maryland because they will be deprived of the love, care and upbringing by their own parents. For them a special bar has been imposed, arising because of their illegitimacy and applicable only against their natural fathers.

B. Rulings of this Court have made it clear that Petitioner's relationship to his child is constitutionally protected.

This court is not being requested to extend its past rulings in any substantial degree by Petitioner's request that he and his baby be guaranteed the same rights given all other Petitioners (and adoptive children) in Maryland. Twice within the past three years this Court has declared the parent-child relationship to be constitutionally protected. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Court ruled that the father of a child possessed a constitutional right to be notified of his child's adoption by outsiders.[11] In *Armstrong*, the father was married and the child involved was born in wedlock. See also *May v. Anderson*, 343 U.S. 528 (1953). Any doubt that the same constitutional protection extended to the relationship between natural parent and child, legitimate or illegitimate, was compellingly removed by this Court's *per curiam* issued only four months ago in *Selman v. Phillips*, 384 U.S. 210 (1966). In that case the issue was, again, absence of notice to the father that his

[11] The Court went further and ruled that it was unconstitutional to impose the burden of showing fitness on the natural father. This latter point is not essential, however, to demonstrate that constitutional protection covers the parent-child relationship in the instant case. If Certiorari is granted, Petitioner asks leave to brief and argue the question of the constitutionality of the imposition of the burden of proof on him by the Trial Court.

children were being adopted by outsiders. But in *Selman* the Petitioner's contention that he was married to the mother of the contested children is amply refuted by the brief record. It appears that prior to her purported marriage to the Petitioner, the mother never was divorced from an earlier spouse. It clearly appeared that the Selman children were illegitimate, and this point was argued by the Respondents to distinguish *Armstrong* in their brief opposing the Petition for Certiorari. By summarily rejecting this distinction, and by not only granting certiorari but by going further in the same opinion, to reverse the Supreme Court of Alaska's denial of Selman's efforts to vacate the outside adoption carried on without notice to him, this Court left little doubt that the due process clause of the 14th Amendment extended to the relationship between *any* natural father and his child.

The present Petitioner seeks application of the equal protection guaranty of the same 14th amendment to him and his child. There is no body of authority, nor is there any discernible constitutional policy which would justify protection of this relationship by the due process clause, while denying to it equal protection of the laws. In the final sense, this Petitioner is prejudiced just as fully — his loss of his child is just as complete — as a result of the discriminatory and insuperable bar interposed against his status as a Petitioner, as he would if denied procedural due process.[12]

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[12] It may well be that this Court will find that Maryland's action also invades Petitioner's right (and that of his daughter) to due process, see *supra*, pp. 17, 21.

C. Petitioner seeks only limited constitutional protection since Petitioner seeks constitutional redress in aid, not in contravention, of the child care policies enunciated by the Maryland Legislature.

Nor does Petitioner's request for equal protection, on behalf of himself and his baby, require this Court to dictate to Maryland (or any other State) policies which under its Adoption laws must be administered. Petitioner's request goes only this far: where the state legislature has made no pronouncement of policy under which adoption of illegitimate children by their natural parents is proscribed, but on the contrary where, as in Maryland, the legislature has enunciated a specific policy endorsing such adoptions, that under these limited circumstances, constitutional intervention by this Court to enforce the equal protection clause on behalf of a deprived natural parent is proper and invades no powers reserved to the States. Thus Petitioner has no argument with the standards for adoption set down by the laws of Maryland. Indeed, as will be shown, they favor this very adoption. Petitioner simply asks that the same standard, that of the fitness of the adoptive parent, be applied to all Petitioners impartially.

Maryland's legislative policies concerning the relationship of the natural parent to his child, and more specifically, providing for the care of illegitimate children are quite clear. Section 67 of Article 16 of the Annotated Code of Maryland, outlining the "Legislative Policy" controlling the chapter on adoptions, states:

> "The General Assembly hereby declares its conviction that the policies and procedures for adoption contained in this subtitle are socially necessary and desirable, having as their purpose the three-fold protection of (1) the adop-

> tive child, *from unnecessary separation from his natural parents* and from adoption by person unfit to have such responsibility, . . . (2) *the natural parents, from hurried and abrupt decisions to give up the child;*" (emphasis supplied)

The phrase "natural parent" in that section and in the entire adoption chapter means just that. Use of the phrase in various contexts make it clear that it embraces both married and unmarried parents.[13] The obvious concern of the Maryland General Assembly for the preservation of the blood tie between natural parent and child is thus stated.

In the specific area of care for illegitimate children, the policies of the Maryland General Assembly are just as clear. Section 66A of Article 16, articulating the "Legislative Declaration" on which Paternity Proceedings in Maryland are based, states:

> "The General Assembly declares its conviction that the State has a duty to ameliorate the deprived social and economic status of children born out of wedlock and that the policies and procedures as contained in this subtitle and in Section 66 of this article relative to establishing the paternity of such children, determining who shall have their custody or guardianship and who shall be charged with their maintenance and support are socially necessary and desirable, having as their threefold purpose (1) the promotion of the general welfare and best interests of such children *by securing to them as near as practical, the same right to support, care and education as legitimate children*: (2) *the im-*

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[13] *E.g.*, Section 74 (b), dealing with necessary consents, require those of "both the natural parents, if married."

> *position upon both parents of such children the basic obligations and responsibilities of parenthood* and (3) the simplification of procedures." (emphasis supplied)

Far from interposing bars against care of illegitimate children by their natural parents, Maryland, by this pronouncement, has enunciated a policy under which illegitimate children appear to be placed in parity (insofar as possible) with legitimate children insofar as provision for their care is concerned. Viewed in combination with the legislative pronouncement cited above (favoring the preservation of the blood tie) the conclusion that the Maryland General Assembly has determined that care of the illegitimate child by its natural parent is, whenever possible, to be favored — is inescapable. Provision (2) of the Legislative Declaration on Paternity (above) seems to make this explicit.

Finally, as part of its Paternity Enactment, the Maryland General Assembly has vested in Maryland's Courts of Equity plenary powers to deal with the care of illegitimate children. The Court, in paternity proceedings, can make every provision for the illegitimate child that it is empowered to decree for legitimate children. Section 66 H (b) of Article 16, in describing the Order of Support that the Equity Court may enter in Paternity Proceedings provides:

> "The Court may include *in the order* any other provision directed against any party to the proceeding, pertaining to the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond, remaining in the State of Maryland, reporting changes of address, *or any other matter which may* be for the general welfare and best interests of the child, to the same extent and *as fully as if the child were a legitimate child,*

> all in accordance with the inherent jurisdiction of courts of equity over minors and the jurisdiction and power conferred by Section 66 of this article and any provision of this subtitle." (emphasis supplied)

Certainly, provision for the adoptive care of a child is a "matter which may be for the general welfare and best interests of the child." And, if the child were legitimate and adoption appeared to be in the best interests of the child, Maryland's Equity courts have always had the power to decree adoption. [14] Under Section 66H, the same power is vested in the equity courts when they order support of an illegitimate child by its father. It appears manifestly intended that the Equity Courts, within such orders, have the power, subject to the notice of all interested parties, to order adoption of the illegitimate child by its father if the best interests of the child warrant it. The pattern of Maryland legislative policy favoring, rather than precluding, an adoption by the father of an illegitimate child, is thus complete.[15]

Because of Maryland's comprehensive pattern of legislative policy favoring adoptions by fathers such as the present Petitioner, it is not necessary for this Court to determine whether Maryland could constitu-

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[14] Indeed, it is interesting to surmise the reaction of an Equity Court to a situation where a natural father who had been married to his child's mother came before the Court as the sole natural parent interested in raising the child – and offered the orderly thoughtful plan for care that the Petitioner did below. It defies reason to believe that the Court would take the child from such a parent and give it to unknown outsiders. Thus, for Maryland, the fact of illegitimacy has had this awesome impact.

[15] Again, depending on the fitness of the adoptive parent. But, of course, consideration of the present Petitioner's fitness was what the Court of Appeals specifically refused to undertake.

tionally enact legislation removing illegitimate children from their parents solely because of their illegitimacy. As Petitioner will argue in another section, it appears clear that such action is beyond the constitutional powers of the state. But in the present case, Petitioner seeks constitutional protection in *aid* of State policy, not to contravene it; to insure equal protection of the laws where state statute requires it, and to protect the parent-child relationship from arbitrary interference by the State Courts where state law patently withholds such sweeping latitude from the courts.

Nor is Petitioner arguing to this Court that the majority of the Court of Appeals of Maryland simply misread Maryland's Adoption laws and Paternity Acts. The majority did more than that. When it erroneously viewed the Maryland statutes as permitting Maryland's courts to disqualify a petitioner from adopting his child solely because the child was born out of wedlock, it compounded error with constitutional injury to the Petitioner and his child.

D. Assuming that the Maryland Adoption and Paternity Statutes authorized Maryland Courts to deprive a father of his child solely because the Child is illegitimate, the Exercise of such Power by Maryland is beyond its Constitutional Powers.

Viewed as a naked act of state interference in the relationship between a father and his child, the decision of the Maryland court raises grave constitutional doubts. Petitioner has indicated that this Court need not answer the question of whether Maryland could validly determine that conception of an illegitimate child, *ipso facto*, barred a Petitioner from recourse to its courts to seek adoption of the child. The Maryland legislature simply has not given its courts that

power. Assuming, however, that the Maryland Adoption statutes and Paternity acts somehow permit such sweeping judicial interference with this intimate family relation, restraining action by this Court against such overriding state power is well precedented. Beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court has carefully erected constitutional safeguards against state infringement on the parent-child relationship. In *Meyer* the right of the parent to educate a child in a modern language other than English was protected from state interference. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) the right of the parent to educate his child in a parochial (or non-public) school was kept free from state infringement. Although the ultimate question of the state's power to remove a child from the care of a fit parent (married or otherwise) has not been before this Court prior to this term, at least one lower federal court has clearly expressed itself on the point and this Court, itself, has pronounced meaningful language (albeit dicta) on at least one occasion. In the former instance, the Court of Appeals for the District of Columbia, in *In Re Stuart*, 72 App. D.C. 389, 114 F.2d 825 (1940), spoke out in sharp terms against action by the District Government which deprived a mother of the care of her child on insufficient evidence (at 832):

> "Under our constitutional system, the citizen has more than a revocable privilege to possess and rear his children. Under our theory of government there is recognized as inherent in parents a right to maintain the custody and to direct the upbringing and education of their own offspring. True, this right is not absolute. If parents treat their children with cruelty or neglect, or are unfit in character or mode of life suitably to control their associations and upbringing, the state for the welfare of the

child may interfere. But rights guaranteed by the constitution are not to be qualified either by legislation or judicial action having no reasonable relation to some purpose within the competency of the state."

In those same terms, the present Petitioner submits that there is no reasonable relationship between the unfortunate accident of illegitimacy and his own fitness to provide adequate care for his child over the many years of her minority. Most certainly there is no reasonable relationship between the deprivation suffered by this child (loss of her own father's care), and the mistakes committed by her parents. This surely is the cruelest example of visiting down on the child the misdeed of the parents.

The Court's language in *Meyer v. Nebraska, supra,* outlined the Court's philosophy of restraint on state action directed toward the parent-child relationship (at 401):

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent . . . The proper officers will take the offspring of the good parents to the pen or fold, and here they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately

> approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those on which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."

It is submitted that Maryland's removal of this child from its sole interested parent without considering his fitness constitutes state action fully as arbitrary, peremptory and insensitive as that described and deplored in the quoted passage.

In determining the limits of state power to dispose of the young, it is essential to recognize that the father's relationship to the illegitimate child has traditionally been protected judicially *where the father was interested and concerned.* The origins of judicial treatment of the illegitimate begin with the common law of England, where the illegitimate child was *nulius filius*, the child of no one. He was considered to have no ancestors or collateral relations. *Blackstone*, Gavit Edition 196-199. Even in England, a father could be made to maintain his illegitimate child, *Blackstone*, Gavit Edition, 198-199, but this rule was not deemed to pass into the common law of the colonies, *Ex Parte Wallace*, 26 N.M. 181, 190 Pac. 1020 (1920); *Fiege v. Boehm*, 210 Md. 352, 123 A.2d 316 (1956). Along with the passage of support acts (the so-called Bastardy Acts) remedying this situation, adoption statutes were enacted to deal with permanent placement and care of illegitimate children. The most prevalent problem of the abandoning father (whose whereabouts often were unknown) gave rise to the dropping, in most of these statutes, of the requirement that the father consent to the adoption of the child. But where the father of the illegitimate

child was responsive to his obligations, the law has been uniform in this country that he is entitled, at the very least, to custody of his child as against the entire world excepting only the child's mother. See *In Re Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954), and cases cited in both 37 A.L.R.2d 867 (1945) and the Annotation at 37 A.L.R.2d 882. Similarly, it is uniform law that in such circumstances (where he seeks custody and the mother, for some reason, does not), he must be awarded custody unless shown to be unfit. As pointed out, the right of the father to adopt the illegitimate child is sparsely documented in the cases, with but three recorded decisions anywhere in this country.[16] These cases, in which the natural father

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[16] But there is recent, controversial and relevant precedent reported in the English cases. In *In re Aster*, (1955) 1 W.L.R. 465, the father of an illegitimate child secured custody of the child against the protest of the mother, who had placed the child with a religious society for purposes of outside adoption. Even more recently, in *In re C. (M.A.)* (An Infant), (1966) 1 W.L.R. 646, the Court of Appeal, on facts strikingly similar to those in the instant case, granted custody of an illegitimate baby to its father (joined by his wife in the one departure from the instant case's facts), over the opposition of the mother, who had placed it with adopters who had cared for the child for 17 months prior to the Court's decision. The mother strenuously resisted the father's petition and supported the adopters, who argued that the child already had a proper home in which it was happy and had been for 17 months. But the trial Court granted custody to the father, and the Court of Appeal, in a decision which received considerable attention in the English press, affirmed on grounds that the blood tie was of moving force in determining that the child was best off with its own father; the Court stated (at 679): "If a father (as distinct from strangers in blood) can bring up his own son as his own son, so much the better for both of them, whether or not by the accident of events the legitimate relationship exists." On March 15, 1966, the Appeal Committee of the House of Lords refused leave to the outside adopters and the mother to appeal. It is quite clear that the fathers in both cases could bring adoption proceedings subsequent to securing custody,

(continued on following page)

was successful,[17] do nothing to diminish the doctrine of the natural father's preferred right to raise his illegitimate son as against the world (save only the mother).

Fears of sweeping intrusion into the intimate parent-child tie by over-proprietary state action leaps unmistakeably from this Court's language in *Meyer*, and from that of the Court of Appeals in *Stuart*. This same apprehension lest the state engage in the extreme paternalism of deciding (for reasons hidden within the mind, psyche and social philosophy of the particular Equity Chancellor) that a child should be taken from his fit natural parent should reasonably extend to the responsible father of an illegitimate child. This is no real extension; it would simply reflect the law's traditional, historic recognition of the preferred parental rights of the father in this situation where the mother declines all parental responsibility. There is every question that Maryland (assuming that she intends to; which is dubious) could constitutionally stigmatize the father of an illegitimate child as a social pariah, unworthy of the commonest form of familial affection. It is even more

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16 (continued from preceding page)
since the British Adoption Act of 1958 (in Section 1(3)) expressly provides that an adoption order may be made authorizing adoption by the infant's mother or natural father in the case of an illegitimate infant; section 57 (1) provides that the order may grant adoption to the parent alone, or jointly to his or her spouse if a marriage has subsequently occurred. English policy is thus very clear, favoring Petitioner's position herein.

17 *In Re Brennan*, ___ Minn. ___, 134 N.W. 2d 126 (1965); *French v. Catholic Community League*, 69 Ohio App. 442, 44 N.E. 2d 113 (1942); *In Re Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954). Because of special facts and circumstances in each of these cases, none were clear precedent below and the holdings do not bear on the issues raised before this Court.

questionable whether Maryland can extend this stigma into an attainder, under which the *child* must suffer an even greater loss — that of the love and care by a blood parent — simply because a majority of its high Court feels that illegitimacy is overweeningly abhorrent.

D. The Baby Girl of the Petitioner has been denied Procedural due Process since the veto of her mother, who is otherwise uninterested, has been substituted for judicial judgment, on full hearing, as to who shall raise her.

The baby girl in this case has suffered special legal deprivation all her own. Born discountenanced by society, her future a conglomerate of the various gambles that persons near her will be responsible and loving, the baby could, in all events, be assured that she would find in the Equity Courts of Maryland, a protector of her chances for a decent life. But that would be true only if the Courts of Maryland were permitted to exercise the normal discretion concerning this baby's future care that they routinely exercise in cases of this sort. In this case, the Equity court has not been permitted to do this. Not only has the person most intimately concerned with this baby, her father, been disqualified for consideration as the baby's adoptive parent; but the child's mother, who for reasons of her own wishes to cut off all trace of this child, has interposed a personal veto of her own over who the adoptive parent of this child shall be. The record is conclusively clear, indeed, it is admitted by all parties below, that from the time this baby was three days old (it is now 21 months old) the mother removed the baby from her own care, placed it out for adoption, has not seen it, nor cared for it, and has insisted through extensive litigation that

strangers adopt the baby. Nonetheless, in face of the mother's "settled purpose to forego all parental duties and relinquish all parental claims"[18] both the Chancellor and the Court of Appeals not only felt that the mother's objection to the Petitioner was meaningful, but to the Chancellor at least, it was dispositive.

The Maryland statute on consent reads as follows (Section 74, Article 16):

> "Consent to any proposed adoption shall be obtained from: (d) the mother of a child born out of wedlock, if she is alive and has not lost her parental rights through Court action or voluntary relinquishment or abandonment:"

Both the Chancellor and the Court of Appeals simply ignored overwhelming authority uniformly reached in jurisdictions where the point has been raised,[19] that mothers who have done what this mother has — in this case — lose their right to consent to adoption.

In consequence, the narrow range of judicial discretion brought to bear on this baby's future is quite graphic. First the father must be excluded from the Court's consideration. Next, judicial consideration of all other adoptive parents must be subject to the

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[18] *Lysooska's Adoption*, 54 Pa. D & C 591 (1945); this formulation was accepted by Maryland in *Logan v. Coup*, 238 Md. 253, 208 A.2d 694 (1965).

[19] *Lysooska's Adoption, supra; In Re Diana*, 165 Pa. Sup. Ct. 12, 67 A.2d 751 (1949); *In Re Davies Adoption*, 353 Pa. 579, 46 A.2d 252 (1946); *In Re Matter of Marino's Adoption*, 168 Misc. 158, 5 N.Y.S.2d 328 (1938); *In Re Davison*, 44 N.Y.S. 2d 763 (1943); *Ex Parte Malley* (In Re A.B.M.), 132 N.J.Eq. 434, 28 A.2d 518 (1942); *In Re Watson*, 238 Mo. App. 1104, 195 S.W. 2d 331 (1946); *Stalder v. Stone*, 412 Ill. 488, 107 N.E.2d 696 (1952); *In Re Cozza*, 163 Cal. 514, 126 P. 161 (1912); *Jones v. Thompson*, 151 Me. 462, 121 A.2d 366 (1956).

veto of the mother, who wants no part of this child except to prevent its father (and, presumably, any other person she might object to) from raising it. This is not giving this baby either a full hearing or the benefit of minimal judicial judgment on the most vital issue ever to affect her life: who will raise her. Substituted instead is the veto of the mother who has already given her up.

II. IN A BENCHMARK DECISION, THE MAJORITY OF THE COURT OF APPEALS HAS MADE ADOPTION UNAVAILABLE IN CIRCUMSTANCES WHERE IT IS SOCIALLY USEFUL. ITS DECISION DEFIES THE REALITIES OF MODERN CONCEPTS OF CHILD CARE. IT SANCTIFIES OUT-MODED SOCIAL TABOOS IN A MANNER WHICH WILL UNREASONABLY RESTRICT FUTURE ADOPTION PROCEDURES THROUGHOUT THE COUNTRY.

The importance of review in this case springs in large part from the legally unprecedented facts and issues involved in it. The novelty of an unmarried father seeking to raise his own little girl over the determined opposition of the child's mother, against whatever odds and attitudes Victorianism can interpose, will inevitably attract public, and then judicial notice. Why it is this question has never before reached the appellate courts in its present clearly-etched form is difficult to say. But when the controversy concerns a situation as human as illegitimacy, and as intimate as a father's attachment to his own flesh and blood, this Court can be assured it will recur with frequency in the future.

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[20] The three contested adoption cases in the state reports, each had special factors which prevented their use as direct precedent for the Maryland Courts, which, of course, would not be bound by them in any event.

When it does, Maryland's *Malmstedt* decision will be the landmark, indeed the sole clear precedent to guide other state Courts. It will thus shape adoption procedures in all the states to a degree which cannot now be ascertained but cannot be minimized. If the decision is merely wrong, benighted and backwards, it will be tragic for the future illegitimate infants hurt by it — but this Court properly could do nothing about that unfortunate result. If it is *unconstitutional*, though, that is another matter.

For then, this Court can properly come to grips with the socially undesirable concomitants of Maryland's peremptory disqualification of this father. In so doing, the Court will not in any sense be condoning or licensing illegitimacy or taking a single step, direct or indirect, to increase its incidence. Although the Maryland Court seemed impelled by this fear, logic cannot connect this adoption, if allowed, with promiscuity or socially aberrant behaviour. On the contrary the rule propounded by the Petitioner encourages responsibility and the recognition of obligation on the part of those persons already caught in this unfortunate situation. Obviously, the opportunity to raise the child is an enticement toward responsibility for the father trying to decide whether to run or stand up to his obligations. If, however, he is barred, *a priori*, from any access to the child, and especially if the mother is responsible for the bar but unwilling to take her own maternal obligation, why then should the father stand and face up to the ugly predicament? He may yet do so, but if his child is denied him and he knows it, he is less likely to do so.

If the father of an illegitimate child is inhibited from assuming the responsibility of care for his child, society is hurt thereby. The inhibition erected by the Court of Appeals of Maryland (curiously the precise opposite of what its legislature so clearly

articulated) is a powerful inhibition. This Court need not be psychiatrically expert to look into the beset mind of a father confronted with the shock of illegitimacy to discern the immobilizing impact of a rule which forbids him his child.

The rationale of the opinion below has even broader destructive impact. In its decision, the majority unmistakeably expresses a preference for the clean, complete surgical cut between the illegitimate child and all traces of its illegitimacy. For the Court, apparently, only the agency adoption (under which the doctrine of secrecy seals off the child and the adoptive parents from any information concerning the origin of the child) is salutory.[21] No one can argue with the prudence of this recommendation in the ordinary case. But this is *not* the ordinary case. And the law of Maryland provides specific supplements to ordinary, agency adoptions. By statute, certain members of the family of the natural parents can place the child out for adoption without recourse to an agency licensed by the State. Section 20, Article 88A, Annotated Code of Maryland:

> ". . . The placement of child by anyone *other than* a licensed child placement agency, local department of welfare or the *child's natural parent or parents, grandparents, or the child's natural parents' adult brothers or sisters* is prohibited." (emphasis supplied)

This is the "family" adoption, where the grandmother, or the aunt, or the sister of one of the natural parents adopts the illegitimate child. It is a socially useful practice. It provides a home for a baby with its own

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[21] "If the action of the Chancellor be sustained, the agency is ready to proceed with a normal, customary adoption proceeding, whereby the child will be placed in a suitable home with a father and mother." (R. 10)

flesh and blood relations. Is society to be denied this eminently practical solution to an agonizing family problem if the otherwise uninterested mother vetoes the family adoption? And, if we are to accept the sweeping social pronouncements of the Maryland Court, the adopted child, in these situations would be "reared as an illegitimate child" just as fully as Petitioner's baby would be.[22] Are family adoptions also to be written out of the statutes of Maryland? Are the adoption laws of the other states permitting "family" adoptions to be judicially amended when these states accept this benchmark opinion?

All of this is giving terrible sanction to social taboos that may have been useful in Victorian society and may retain some residual validity today. But judicial hand-wringing over the stigma of illegitimacy should not be mistaken for trained medical testimony on the *real* fears and insecurities which pervade this difficult situation and plague its infant victim. Expert medical opinion in this record — the unrefuted testimony of an expert, eminent child psychiatrist — tells us that the infant child's feeling of abandonment by her natural parents is a near-inevitable result of all adoptions, raising serious anxieties of varying magnitudes for all adoptive children. These very fears are those most effectively countered by adoption by the natural father. As the child psychiatrist stated it most plainly (at E60):

> "It answers the feelings of the child in being loved, not being totally abandoned."

and (at E59):

> ". . . But this child will know that this is its natural father. That he loved her; cared for her and raised her. He loves the mother of the child and a very, very significant part of

[22] In the sense that the adoptive parent would know, and the baby would have access to knowledge, of the illegitimacy.

> the normal identity problems of the child, in answering the questions 'Who am I?' 'Where did I come from?' would take care of itself."

This represents the trained, modern-day view of disturbances that all innocent victims of illegitimacy must endure, no matter how or by whom they are adopted. It stands unrefuted by any medical testimony in this record. Indeed, Petitioner prays that this Court examine with care the psychiatric testimony in this record. There, he submits, the Court will find just how directly his adoption of his little girl will ameliorate the terrible emotional problems that inescapably she begins life with. In this light, Petitioner's proposal seems the mature, enlightened way to give his little girl the best possible chance for a normal life. Up to now this best hope for the child has been denied her. The majority of the Court below has preferred to resurrect the dead weight of outmoded social taboos and force it on a father and his daughter in an arrogant intervention of state power.

Beyond fine constitutional niceties, Maryland has rendered unto Caesar something that is not his. The spectre of the sovereign breaking a natural blood tie for reasons reflecting the sovereign's current social beliefs and prejudices is an uneasy one to view. Where next will the sovereign determine that children will suffer? At the hands of foreign-born parents? At the hands of parents with obscure, or with no religious beliefs whatsoever? At the hands of persons of unpopular racial origins? If the power that Maryland has exercised so peremptorily in this case, and has exercised in defiance of its own legislative mandates, is unchecked -- there appear few limits on the sweeping power of the all-powerful and all-wise sovereign to determine what is best for its children and act accordingly. Both the family tie and blood tie

will then be subordinated — who knows how far? This is the Sparta so alien to American traditions.

For reasons stated hereinabove, Petitioner respectfully submits that this Court should review and reverse the judgment of the Court of Appeals of Maryland, remanding the cause to that Court with instructions concerning the constitutional safeguards to be observed in future proceedings in its disposition by the Courts of Maryland.

Respectfully submitted,

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APPENDIX A

Majority Opinion of the Court of Appeals of Maryland

Although the factual situation here presented is novel to this Court, the opinion need not be an extended one. In adoption proceedings relative to minors, the primary matter for consideration by the courts is still the best interest of the minor.

On March 2, 1965, the appellant filed a petition seeking to adopt his illegitimate child, born in January of that year. At that time, he was 21 years old and the mother of the child 19. The child was in a licensed child placement agency, where she had been entered by her mother. The appellant's paternity was and is undisputed. Neither of the parents have ever married. The petition for adoption was not accompanied by the mother's consent thereto or by the consent of the placement agency as ordinarily required by Code (1965 Cum. Supp.), Article 16, Section 74 (d) and (g). The trial judge held that the mother had not lost her parental rights, that she had not consented to the adoption, and she had not withheld her consent contrary to the best interest of the child; hence he denied the adoption petition, and the father appealed.

We shall proceed quickly through the arguments that lack merit, and reach the nub of the case as soon as possible. Appellant argues that Code (1965 Supp.) Article 16, §§ 66A-66P, the statutes relating to bastardy proceedings, grant him certain rights and standing in this adoption proceeding. We have carefully considered this contention, but find nothing in the statutes named to aid him under the circumstances here involved. Unlike some of the states, Maryland has not seen fit to grant specific rights to fathers of illegitimate children in regard to adoption (adoption proceedings being purely and entirely statutory in nature). On the contrary, subsection (d) requires his consent only when he is alive and the child

"has been legitimated according to the laws of any jurisdiction," a situation not existing here.

He also claims that the mother has lost her parental rights through voluntary relinquishment and abandonment to the child placement agency (subsection [d], *supra*); consequently, her consent was not necessary. Subsections (d) and (g), *supra*, require either the consent of the mother or the consent of the child placement agency, if the mother has relinquished her parental rights to it; so, whether or not the mother has relinquished her parental rights is of no significance here, for if she has, or has not, our present question for determination boils down to a question of fact as to whether she or the agency (it has filed a brief in support of the mother's petition) has withheld consent "contrary to the best interest of the child." Section 74, *supra*.

The appellant seems to think that the trial judge found him unfit to raise a child. This is not true. It was unnecessary for the judge to reach that question, and we do not reach it either. Our only question is to determine what the welfare of the child demands.

At the outset the Court wishes to state that it is impressed with the truthfulness and candor of the parties and their witnesses, a situation that does not always prevail in vigorously contested litigation.

The appellant is a young unmarried man (with no present plans for marriage) who, by his own admission, is unable to care for the child if his petition were granted. His present financial worth is "approximately zero," with his parents paying his college expenses, except what it is "possible" for him to pay. His plans were to continue and to complete his college education, which would require at least 2 years. During those two years, the child would live with his mother, 54 years of age, and his father, who is 50, both of whom are in good health, in an apartment

consisting of 2 bedrooms, living room, kitchen and bath. Appellant's father is frequently long distances from home for extended periods of time, due to his employment. Appellant's mother is a "domineering" person, according to one physician, who "often pressured the petitioner and influenced him with many decisions," which "was mainly the core of many of [his] problems while under [psychiatric] treatment." The college to be attended by the appellant is some 95 miles from his parents' apartment. The appellant testified that all of his close friends had already been informed of the present situation, that they will be informed of the outcome thereof, that he felt that such knowledge by his friends and people in the community will not be "detrimental," and that he will tell the child, at whatever age she might inquire, the truth concerning her birth and background.

After entering college in 1961, appellant withdrew twice, and, at the time of the hearing below, had completed only three semesters. After the second withdrawal, he received psychiatric counseling and was later, after examination classified 1-Y (not eligible for service unless actual emergency exists, according to appellant) by the Selective Service officials.

We have examined with care the testimony of the two expert witnesses offered by the appellant, but due to their very short acquaintances and brief interviews with the appellant, the plain, uncontroverted facts of this case, and our own rather extensive experience in this particular field, we have not found their opinions to be of substantial aid in the decision we must make.

One witness, with about 35 years' experience in child placement, stated it was "unheard of" to place children with an unmarried man, and she could not "think of anything [the great many problems that could arise in the event that the petition were granted] that would be worse for a child's security."

The trial judge had the County Department of Parole & Probation investigate matters relative to the petition. In a very comprehensive and skillful report, it was recommended that, if the two young people would not get married, the petition be denied. And we have already mentioned that the licensed child placement agency where the child now is (one with many years' experience) likewise recommended a denial.

If the action of the Chancellor be sustained, the agency is ready to proceed with a normal, customary adoption proceeding, whereby the child will be placed in a suitable home with a father and a mother.

We have frequently said that in cases of this nature that unless there is some reason to the contrary, the findings of the Chancellor will not be disturbed. *Andrews v. Andrews*, 242 Md. 143, *Raible v. Raible*, No. 302, This Term. Hence, our only duty is to determine whether there is cause to set aside the Chancellor's finding that the mother's (or agency's) consent was not withheld contrary to the welfare of the child.

The facts, we think, speak for themselves, and it would be rather useless to point out in detail all of the reasons that sustain the Chancellor's ruling. It should be apparent to all that through infancy, adolescence, and young lady-hood it will be decidedly more advantageous to be raised in a normal, wholesome home with a mother and a father, than to be reared as an illegitimate child by the father alone, with the many potential, possible complexities and problems attendant to such a rearing. It is obvious to us that the facts impelled the Chancellor's holding; consequently, we not only find no reason to disturb his ruling, but state that had it been otherwise, we would have had to change it.

DECREE AFFIRMED: APPELLANT TO PAY THE COSTS

APPENDIX B

Dissenting Opinion of Judge William R. Horney

I agree with the majority that the primary matter for courts to consider in the adoption of minors is the best interests of the child, but I do not agree that the adoption by strangers of the baby girl who is the subject of this unfortunate familial feud will inevitably be in her best interests. Rather the unusual circumstances of this case indicate that the natural father (who wants her) should have been permitted to adopt the child who, but for the callousness of the natural mother (who does not want her), would have been legitimated by the marriage of her parents. Neither the laws of God nor the laws of man forbid adoption by the natural father. The father has clearly demonstrated his love for the child by seeking her adoption. There was no finding, as the majority pointed out, that the father was unfit to rear the child. And, which is more important, the child, had she been allowed to become the adoptive daughter of her natural father, and despite his present unsettled plight, would have lived with and been provided for with care and affection by blood relatives — her paternal grandparents — who are undoubtedly also devoted to the child.

Nor do I agree, had the father been permitted to adopt his daughter, that she would have been "reared as an illegitimate child" for, had the adoption been granted, the child would in law have become a legitimate daughter. In that event the situation would have been the same had her parents married and her mother thereafter died. Had that happened — as in effect it did since the mother by giving up her parental rights and putting the child out for adoption has died at least so far as the child is concerned — the father would undoubtedly have taken the child to his parents, there being no impediment to hinder him, to be reared

by them for the time being as the father had planned had his petition to adopt the child been granted.

I would reverse the decree denying adoption and remand for such further proceedings as might be necessary to safeguard the best interests of the child pending her eventual adoption by the natural father.

APPENDIX C

Memorandum Opinion and Order of the Circuit Court for Montgomery County, Maryland

This case comes before the Court on the petition of Hans-Ola Toresson Malmstedt who seeks to adopt his illegitimate child born out of wedlock to [*], the natural mother of the child.

The natural mother of the child opposes its adoption by the natural father and has refused to give her consent to said adoption and has filed a petition to intervene in these proceedings.

The infant child, a little girl, was born January 25, 1965 and placed in the care and custody of the Church Mission of Help of the Diocese of Maryland, Inc., a licensed child placement agency, licensed by the State Department of Public Welfare. The Church Mission has also filed a petition to intervene in these proceedings since it has the physical care and custody of the infant.

The right to intervene in these proceedings was allowed by Order of Court both to the natural mother and to the Church Mission.

The testimony discloses that the petitioner is 21 years of age and unmarried. He is presently employed as a shipping clerk in a Boston store, but hopes to return to the University of New Hampshire to complete his education. His parents are citizens of Sweden, as is he, and if he is awarded custody of the infant child, she will be cared for by his mother. He has no plans for marriage.

The natural mother of the child, [ ], is 20 years of age and resides with her parents at [ ] Maryland. She is presently attending [ ] University in [ ].

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* [See footnote page A-11]

Hans Malmstedt and [ ] first met in Nicaragua in 1958 when his father was a Merchant Marine Engineer Adviser for the Nicaraguan Government and her father was attached to the American Embassy there. They met again thereafter when both were attending college in New Hampshire where they resumed their friendship. [ ] frequently visited at the home of Hans' parents in Hanover, New Hampshire during this period and his mother knew that she was pregnant prior to the time her own parents had any knowledge of it. His mother tried to persuade her to marry him, and, indeed, at one time a license to wed was secured. However, she later told her parents about her condition and returned to her home in [ ]. After careful thought and consideration she decided not to go through with the marriage, reasoning that an unhappy marriage would not be to the advantage of either party. Prior to the child's birth she decided to place it after birth with the Church Mission of Help of the Diocese of Maryland, Inc., for guardianship, with the right to consent to adoption, and so advised the petitioner.

When the child was three days old she was placed with the Church Mission of Help for guardianship, with the right to consent for adoption and eventual adoption under placement by that Agency. She presently remains under foster care placement by the Agency in Baltimore County.

However, prior to obtaining the consent of the natural mother, [ ], and the filing of a petition for guardianship, with the right to consent to adoption by the Agency, the petitioner, Hans-Ola Toresson Malmstedt, filed a petition in this Court seeking to adopt his illegitimate daughter. At the hearing it was admitted by his attorney that he had no more standing in Court than a stranger seeking to adopt the child. It may be pointed out by the Court that the child's mother is an attractive and very

intelligent young girl who made excellent grades in college and who is well qualified to make decisions respecting her own best interests and those of the minor child. Her decision in this case was made after careful consideration as to what, in her opinion at least, would be for the best interests of the child.

Article 16, Section 75, Maryland Code (1957) provides that "Consent to any proposed adoption shall be obtained from: * * * (d) the mother of a child born out of wedlock, if she is alive and has not lost her parental rights through Court action or voluntary relinquishment or abandonment * * *;" and Rule D73, Maryland Rules of Procedure, provides: "A decree of adoption or of guardianship with the right to consent to adoption shall not be entered until there has been filed in the proceeding the signed and verified consent required by law, or unless the Court shall have found after hearing that a consent required by law had been withheld contrary to the best interests of the child."

In the instant case the mother has never given her consent to the adoption of her child by the petitioner and has refused to do so because, in her opinion, it is not in the best interests of the child. Furthermore, she has never given her consent to guardianship with the right to consent to adoption to the Church Mission of Help, the child placement agency. Mrs. J. Carroll Johns, Executive Director of the Church Mission of Help, testified in her deposition filed in these proceedings that Miss [ ] had never in any way relinquished her legal right to the control and custody of her child and that the Agency upon demand at any time would return the child to Miss [ ].

As in custody cases the welfare and best interests of the child are the primary considerations in all adoption proceedings. *Walker v. Gardner*, 221 Md. 280, 157 A (2d.) 273. The test as to what is the

"best interests" of the adoptive child necessarily depends on the facts and circumstances in each case. *Shatler v. Fink*, 231 Md. 302, 190 A (2d.) 76.

In the Court's opinion it is manifestly in the welfare and best interest of the child that the petition for adoption should be denied. The petitioner is a young unmarried man who, by his own admission, is unable to care for the child should the petition be granted. His plans are that the child would be cared for by his mother until such time as he is married and his wife could then take care of the child. These are possibilities which might never come about, and, should he marry, his wife might not desire the child or prove a good mother. As stated by the witness Mrs. Johns, a child should be placed in a family where there is a father and mother to give the child a normal family experience and who would love and raise her as their own. Here the child, knowing that she was adopted by an illegitimate father would want to know why her mother did not want her, which, in reality, would be manifestly unfair to the mother. The plan as thought out by the mother for the child's adoption appears to be best suited to insure the child's welfare, best interests and future happiness. In arriving at this conclusion the Court has had the benefit of a complete and comprehensive investigation by the Probation Department for Montgomery County, made at the request of counsel for the petitioner.

Furthermore, the mother's consent which is a necessary element to the adoption, unless unjustifiably withheld, is totally lacking. There is absolutely no evidence that the mother's consent was unjustifiably withheld according to the important factors as laid down in *Shatler v. Fink, supra.*

For the above reasons the petition for adoption will be denied as well as the oral motions made at the conclusion of the case for custody and for guardianship with the right to consent to adoption by the

grandmother, Magnhild Malmstedt. Also these last two oral motions are not properly before the Court.

It is, therefore, ADJUDGED, ORDERED and DECREED, this 15th day of October, 1965, by the Circuit Court for Montgomery County, sitting as a Court of Equity, that the petition of Hans-Ola Toresson Malmstedt for the adoption of the minor child named in these proceedings be, and the same is, hereby denied; and

It is further ordered that the case be dismissed. Costs to be paid by the petitioner.

THOMAS M. ANDERSON
Judge

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* Details concerning the mother of the child have been intentionally omitted. The omissions are indicated by brackets. See footnote 2 *supra* page 3.

APPENDIX D

Maryland Statutes

Article 1 § 16. Child to include illegitimate child.

The word child or its equivalent shall be construed to include any illegitimate child, except in matters of inheritance, descent or distribution of real and personal property, unless such a construction would be unreasonable.

Article 16 § 66 Equity jurisdiction as to custody, guardianship, maintenance and support; venue; limitations on institution of paternity proceedings.

(a) The several equity courts of this State shall have original jurisdiction in all cases relating to the custody, guardianship, maintenance and support of legitimate and illegitimate children, . . .

(c) In the case of an illegitimate child or children, proceedings on the bill or petition shall be had in accordance with the provisions of the subtitle "Paternity Proceedings" of this article; and the equity courts of this State shall have the additional jurisdiction and power as provided in the subtitle . . .

PATERNITY PROCEEDINGS

Article 16 § 66A. Legislative declaration.

The General Assembly declares its conviction that the State has a duty to ameliorate the deprived social and economic status of children born out of wedlock and that the policies and procedures as contained in this subtitle and in § 66 of this article relative to establishing the paternity of such children, determining who shall have their custody or guardianship and who shall be charged with their maintenance and support are socially necessary and desirable, having as their threefold purpose (1) the promotion of

the general welfare and best interests of such children by securing to them, as near as practical, the same right to support, care and education as legitimate children; (2) the imposition upon both parents of such children the basic obligations and responsibilities of parenthood and (3) the simplification of procedures.

Article 16 § 66H. Orders of court.

(b) Provisions as to custody, guardianship, bond, etc.—The court may include in the order any other provisions, directed against any party to the proceeding, pertaining to the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond, remaining in the State of Maryland, reporting changes of address, or any other matter which may be for the general welfare and best interests of the child, to the same extent and as fully as if the child were a legitimate child, all in accordance with the inherent jurisdiction of courts of equity over minors and the jurisdiction and power conferred by § 66 of this article and any provision of this subtitle.

ADOPTION

Article 16 § 67. Legislative policy; subtitle related to Article 88A, §§ 19 to 32.

The General Assembly hereby declares its conviction that the policies and procedures for adoption contained in this subtitle are socially necessary and desirable, having as their purpose the three-fold protection of (1) the adoptive child, from unnecessary separation from his natural parents and from adoption by person unfit to have such responsibility, and (except in Garrett and Washington counties), whenever practicable, from adoption by persons of a different religious belief than that of the minor or his parents, unless the natural parent or parents specifically indicate or consent to a different choice; (2) the

natural parents, from hurried and abrupt decisions to give up the child; and (3) the adopting parents, by providing them information about the child and his background, and protecting them from subsequent disturbance of their relationships with the child by natural parents.

The General Assembly further declares that this subtitle is related to the subtitle on "Child Care" of Article 88A, §§ 19-32, of this Code, and should be read in relation thereto.

Article 16 § 70. Who may adopt.

Any person over twenty-one years of age may petition the Court to decree an adoption . . . .

Article 16 § 74. Consent.

Every petition for adoption shall be accompanied by written statements of consent, subscribed and sworn to before a person authorized by law to administer an oath, as specified in this section, except that the court may in its discretion permit any petition to be filed with a necessary consent if such consent is added to the petition before the time set for hearings. However, the court may grant a petition for adoption without any of the consents hereinafter specified, if, after a hearing the court finds that such consent or consents are withheld contrary to the best interests of the child.

Consent to any proposed adoption shall be obtained from: * * *

(d) The mother of a child born out of wedlock, if she is alive and has not lost her parental rights through court action or voluntary relinquishment or abandonment, * * *

Article 72A § 1. Natural guardianship.

The father and mother are the joint natural guardians of their minor child and are jointly and severally charged with its support, care, nurture, welfare and education. They shall have regular powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody. If either the father or mother dies, or abandons his or her family, or is incapable of acting, the guardianship devolves upon the other parent. Where the parents live apart, the court may award the guardianship of the child to either of them. Provided: The provisions of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interests would be adversely affected by remaining under the natural guardianship of its parent or parents.

CHILD CARE

Article 88A § 19. Legislative policy.

The General Assembly hereby declares as a matter of legislative policy its conviction that the paramount consideration of this subtitle is the protection of the children affected by it. The condition of childhood is such that a child is not capable of protecting himself, and when its natural parents for any reason have relinquished its care to others, there arises the possibility of certain risks to the child which in turn require comparable and offsetting measures. When the interest of a child and those of an adult are in conflict, the doubt should be resolved in favor of the child.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 625

In the Matter of

The Petition of HANS-OLA T. MALMSTEDT for the Adoption of a Minor

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

Joint Brief in Opposition for Respondent Mother and Church Mission of Help of the Diocese of Maryland, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (R. 6-14) is reported at 243 Md. 92, 220 A.2d 147 (1966). As a practical matter, the 'opinion' of the Circuit Court for Montgomery County embraces three separate documents, namely: a) Decree filed September 22, 1965 [redacted]

(E 96-97),[1] b) Decision filed October 20, 1965 (Resp. App. 3a-5a),[2] and c) Memorandum Opinion and Order also filed October 20, 1965 (E 97-101).[3] None of said documents are reported either officially or unofficially.

QUESTION PRESENTED

Whether any of Petitioner's constitutionally-protected rights were violated by a state court's denial of his petition for adoption of his own illegitimate child born out of wedlock on the grounds that such adoption would be contrary to the best interests of the child.

STATEMENT

The facts in this case can be stated quite simply. A childhood friendship between Petitioner and Respondent Mother (E 30) culminated in pregnancy during her freshman year at college (E 31). Before her child was born, Respondent Mother had made up her mind not to marry the Petitioner (E 91). Acting in accordance with her convictions regarding her child's best interests (E 90-91), she made arrangements to place her child with the Church Mission for adoption (E 89).

The Church Mission is an agency of the Protestant Episcopal Church of the Diocese of Maryland. It is a social casework agency that works primarily with young people (E 16, 80); it is licensed by the State of Maryland as a child placement agency (E 32); and, it makes no charge for its services (E 85). The Church Mission intervened in the present proceedings (E 8, 11-13) because the Re-

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[1] It was from this Decree that Petitioner entered his appeal to the Court of Appeals of Maryland on October 8, 1965 (E 101). Said Decree is not appended to the Petition filed herein.

[2] Said Decision is not appended to the Petition.

[3] Said Memorandum Opinion is appended to the Petition as Appendix C (Pet. App. A-7 to A-11).

spondent Mother's child had been in its physical care and custody ever since she was three days old (E 29-30).

On March 2, 1965, the Petitioner filed a petition (E 3-4) under Article 16, § 70 (Pet. App. A-14),[4] seeking to adopt his illegitimate child born January 25, 1965. The Petitioner admitted paternity (E 3, 43), and the trial court's finding that "the minor child is the daughter of the [Petitioner] and the [Respondent Mother]" is undisputed (E 96). Neither of the natural parents are now married, nor have either of them ever been married.

The petition for adoption filed by Petitioner was not accompanied by the Respondent Mother's consent (E 96, 97), as *conditionally* required by Maryland statute.[5] After trial, a Decree was entered by Judge Thomas M. Anderson denying the petition [redacted] (E 96) which included the following finding:

> "5. That the consent of the [Respondent Mother] was not withheld contrary to the best interests of the child."

As a result of said finding, and solely as a result thereof, the petition for adoption could not have been granted without the Respondent Mother's consent.

There was abundant evidence to support Judge Anderson's finding of fact, concurred in by the Court of Appeals of Maryland (243 Md. at 96-97, 220 A.2d at 150), that the Respondent Mother's consent was not withheld contrary to the best interests of the child. The Petitioner is twenty-three years old and unmarried (E 3, 23). He is financially dependent on his parents (E 3-4, 47, 49-50). He is the only child (E 23) of a "dominant" mother (E 24, 35) who repeatedly referred to Respondent Mother's child as her

---

[4] Unless otherwise stated, all citations herein to the Maryland statutes refer to the Annotated Code of Maryland, 1957 Edition.

[5] Article 16, §§ 74, 74(d) (1965 Cum. Supp.).

"grandchild" (E 74, 78). Since first entering college in 1961, he has withdrawn twice and completed only three semesters (E 47, 48). After dropping out of college for the second time in 1963, he received psychiatric counselling and was later classified as 1-Y ("not eligible for service") by the Selective Service (E 48). He has never been regularly employed for more than a few months at a time (E 25). Having no separate residence of his own, he proposed to place the child in the physical care and custody of his parents for approximately two years (E 3, 41, 51, 75) while he was completing his college education (E 43, 51). He would have to commute 190 miles round-trip to visit the child on week-ends and vacations (E 45). Finally, and of paramount importance, the investigation report filed herein by the Maryland Department of Parole and Probation (E 23) did not recommend granting the petition for adoption (E 38-39).[6]

The Petitioner presented two expert witnesses, Dr. Allan S. Berger (E 54) and Mrs. Francis P. Simsarian (E 66). Dr. Berger's opinions were based on two brief appointments with the Petitioner (E 65). Mrs. Simsarian had never met the Petitioner or his mother until the night before the hearing. Judge Anderson disregarded the testimony of both witnesses in his Memorandum Opinion (Pet. App. A-7; E-97), and the Maryland Court of Appeals found their opinions to be unhelpful (243 Md. at 95-96, 220 A.2d at 149).

The Respondent Mother testified herself (E 88, 91) but did not call any witnesses on her behalf. The Church Mission presented one expert witness, Mrs. J. Carroll (Dorothy C.) Johns (E 80). Mrs. Johns has been associated with the Church Mission for 34 years and is now its Executive Director (E 16, 80). She has recently retired as chairman of the Maryland Department of Public Welfare's Advisory

[6] The preparation of an investigation report was required by court Order (E 13-14).

Committee on Adoption (E 18, 81). Mrs. Johns testified as follows: That, in her experience, placing children for adoption with an unmarried man was "[u]nheard of" (E 19, 21, 84); that the Church Mission would return the child to Respondent Mother at any time upon demand (E 21, 99); that the most advantageous time to complete the arrangements for the placement of a child is between the ages of 2½ and 3½ months (E 21); and, that a petition for guardianship with the right to consent to adoption[7] was prepared and forwarded to Respondent Mother for signature in March, 1965, when the child was two months old (E 21-22, 83), but that said petition was never signed because of the uncertainties raised by the filing of Petitioner's petition for adoption on March 2, 1965 (E 22, 83; see also, E 89-90, 95).

Today this 21-month-old child is still in foster care placement under the auspices of the Church Mission.

ARGUMENT

I. This Court Lacks Jurisdiction

Respondents respectfully point out to the Court that it lacks jurisdiction over this case because Petitioner has raised his alleged "constitutional" issues for the first time in this Court. At no time before the Circuit Court for Montgomery County or in the Maryland Court of Appeals did Petitioner cite or rely upon the Fourteenth Amendment, nor did he raise the due process and equal protection questions posed in his Petition. Neither court below passed upon such questions. Both courts relied entirely upon non-federal grounds for their decisions. Under such circumstances, this Court has no jurisdiction over the case.[8]

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[7] Article 16, § 72 (1965 Cum. Supp.).

[8] 28 U.S.C. § 1257(3); Supreme Court Rule 19(1)(a); Stern and Gressman, *Supreme Court Practice* (3d Ed., 1962), § 3-25. It may also be noted that the Petition fails to specify how, when or where a federal question was raised in the Maryland courts, as required by Supreme Court Rule 23(1)(f).

II. The Maryland Courts Correctly Applied the Statutory Standard Governing Adoption Proceedings

The sole issue in the trial court was whether it would have been in the best interests of the Respondent Mother's child to have permitted her adoption by Petitioner—a question of family law peculiarly within the competence of the Maryland courts. Supervision over the adoption of illegitimate children is a routine matter for the state courts acting under state statutes. The standard universally applied in all adoption proceedings is 'the best interests of the child'.

In this case, the 'best interests of the child' standard appears in Article 16, § 74 of the Maryland adoption law, which provides in pertinent part as follows:

> "Every petition for adoption shall be accompanied by written statements of consent * * *. However, the court may grant a petition for adoption without any of the consents hereinafter specified, if, after a hearing the court finds that such consent or consents are withheld contrary to the best interests of the child.
>
> "Consent to any proposed adoption shall be obtained from:
>
> * * *
>
> "(d) The mother of a child born out of wedlock * * *.
>
> * * *"

The opinions by the Courts below make it abundantly clear that the statutory standard controlled their decisions. In his Memorandum Opinion and Order, Judge Anderson followed the statute explicitly, stating (Pet. App. A-9, A-10; E 99):

> "As in custody cases the welfare and best interests of the child are the primary considerations in all adoption proceedings. Walker v. Gardner, 221 Md. 280, 157 A (2d.) 273. The test as to what is the 'best interests' of the adoptive child necessarily depends on the facts and circumstances in each case. Shetler v. Fink, 231 Md. 302, 190 A (2d.) 76.

> "In the Court's opinion it is manifestly in the welfare and best interest of the child that the petition for adoption should be denied. * * *"

Similarly, the Maryland Court of Appeals prefaced its consideration of the record by restating the statutory standard as follows (243 Md. at 93, 220 A.2d at 148):

> "In adoption proceedings relative to minors, the primary matter for consideration by the courts is still the best interest of the minor."

After applying the statutory standard to the record (including all of the evidence bearing on Petitioner's "fitness", *supra*, pp. 3-4), the Court concluded (243 Md. at 96-97, 220 A.2d at 150):

> "It is obvious to us that the facts impelled [Judge Anderson's] holding; consequently, we not only find no reason to disturb his ruling, but state that had it been otherwise, we would have had to change it."

Since the Respondent Mother withheld her consent, the duty of the court under the Maryland adoption statute was to determine wherein lay "the best interests of the child." That is what both courts below said the issue was, and what they said they were deciding (Pet. App. A-2, A-10). That is what they did decide—namely, that for many reasons it was not in the best interests of this particular child to be adopted by this particular Petitioner under the particular circumstances reflected by this record.

III. The Issues Which Petitioner Attempts To Raise Are Not Involved in the Case

Throughout his argument, Petitioner assumes that the Circuit Court for Montgomery County and the Maryland Court of Appeals decided this case on the ground that a father of an illegitimate child is automatically ineligible to adopt his child.[9] Quite the opposite is true. The opinions

[9] *E.g.*, see pages 12-14, 21, 27, 28 and 30 of the Petition.

below make clear that *if* the best interests of this child would be served by allowing Petitioner to adopt her, the petition for adoption would have been granted. But the Maryland courts found otherwise. In so doing, both courts below precisely and specifically followed the language of Maryland's adoption statute, *supra,* p. 6, which Petitioner does *not* attack as unconstitutional (Pet. 12, 14, 17, 19).[10]

Petitioner's charge of "state interference in the relationship between a father and his child" (Pet. 21) is analagous to a charge in a divorce case that awarding custody of a child to one parent is an interference with the relationship between the child and the other parent. Obviously, when the custody or adoption of a child is put in issue, through whatever circumstances, the state has a right and a duty to intervene.

And, finally, if Petitioner is arguing, as he seems to be at pages 21-27 of his Petition, that he has a statutory right to custody of the child as long as he is a "fit" person, regardless of the child's best interests, the simple and complete answer is that the Maryland adoption statute provides otherwise.

CONCLUSION

For each and all of the reasons cited above, the Petition should be denied. In addition, Respondents wish to point out that there is no national policy reason for the Court to decide this case, even if the questions presented by Petitioner were properly before the Court. Petitioner himself has admitted that this is an exceptional case, not likely to arise again; in fact, he can only find three state court cases even indirectly in point in the entire history of American jurisprudence (Pet. 10, 25).

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[10] Moreover, if Petitioner's attack had been on the constitutionality of Maryland's statute, his relief in this Court would be by way of appeal rather than certiorari. Stern and Gressman, *Supreme Court Practice* (3d Ed., 1962), § 3-4.

Respondents respectfully urge the Court to deny the Petition promptly so that the child involved here can be placed in a loving home with adopting parents at the earliest practical date.

Respectfully submitted,

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APPENDIX B

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

Adoption Equity No. 3087

EX PARTE:

In the Matter of the Petition of

HANS-OLA TORESSON MALMSTEDT

for the Adoption of a Minor

Judge Anderson's Decision*

In arriving at a decision in this case the Court has carefully considered both the law and the evidence, and, in addition, has had the advantage of a very complete adoptive investigation, made by the Probation Department of this Court.

After carefully considering the law as laid down in the Adoption Statute and in the Maryland Rules, and considering the evidence from the witness stand of the various witnesses who testified in this case, the Court is of the opinion, and so finds, that the Petition for Adoption must be denied and the case dismissed.

In fairness to all parties, I feel that I should point out the reasons which prompt me to come to this conclusion.

In this case the Petitioner is a young man, twenty-two years of age, or will be twenty-two in October. He is unmarried and he seeks to adopt his illegitimate child, born out of wedlock. The mother of the child has refused to

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* At the conclusion of the adoption hearing held September 10, 1965, Judge Anderson announced his decision orally from the bench. The original transcript of the decision was subsequently revised by Judge Anderson; and, on October 20, 1965, a corrected transcript was filed substituting his final decision hereinabove set forth as Exhibit B. Through an oversight, the record extract of trial court proceedings contains the original decision announced from the bench (E. 91-94), rather than the final decision.

give her consent for the adoption, and has made other plans for the adoption of the child, and has placed the child with the Church Mission of Help of the Diocese of Maryland, Incorporated, a responsible and reliable institution of this State, which bears an excellent reputation.

The Court might point out that it would be impossible for the natural father of this child, who is the Petitioner in this case, to adopt the child and expect to support her. He would have no means of taking care of the child himself. He is only twenty-two years old. He is presently employed, but he is a student at the University of New Hampshire and plans to return there in the spring. He is presently self-supporting, but has no funds with which, even at the present time, to support her, and the testimony has been that his mother and father would support the child and have custody of her. Consequently, if the Court should grant the Petition, what the Court would be doing, in essence, would be to grant his mother the actual adoption of the child. Now, if anything should happen to his mother, or his father, and his father is in the Merchant Marine, and away a great deal, he would be in no position to care for the child, and the Court must look to what is for the best interest of the child.

I might point out that the natural father, who is the petitioner in this case, has never seen this child. He doesn't know what the child looks like. He just knows he has had a child. His mother, the grandmother of the child, has never seen the child. They know there is a child, but it would be a far different situation if they had had custody of the child since the child was born, or the child had been in their custody for some time and now they would be deprived of that custody, but that is not true in this case.

Turning to the legal side, the consent of the mother is an absolute necessity, unless the Court finds that the consent was withheld contrary to the best interest of the child.

In the case of Shetler v. Fink, 231 Md. 302, 190 Atl. (2nd) 76; the Court there, in essence, stated, referring to

Section 74 of Article 16 of the Maryland Code and the Maryland Rule D73, that the present statute and Rule contemplated that a Decree of Adoption shall not be granted until a signed and verified statement of consent has been filed in the adoption proceeding, unless the Court shall have found after hearing that the required consent had been improperly withheld.

In the same case the Court, in essence, stated that wilful abandonment, failure to contribute to support, neglect to see or visit, and the unfitness of a natural parent, are some of the important factors to be considered in determining whether consent has been unjustifiably withheld; and that station in life, financial and religious considerations, are of secondary importance.

It would appear to the Court that the mother of this child gave careful consideration as to what she was going to do with the child, and what would be for the best interest of this child, before she placed the child with the Church Mission of Help of the Diocese of Maryland, Inc., with the intention that they should be granted guardianship, with the right to adoption, and it was her considered judgment that it would be best for all parties concerned that this child be adopted by a responsible, as she stated, "young couple" who could give it love and affection and raise it as their own child while it is quite young rather than have the child know the father and know that the mother had determined that she did not want to keep her, that she had been turned over by the Court to the father because the mother did not want the child.

I realize that this is a case that has caused the natural father, the petitioner in this case, a great amount of heartache and his mother, too, but I can only come to the conclusion I have come to, as disagreeable as it may be to the Petitioner and his parents, that the Petition should be denied and the case dismissed.

I will file the investigative report in the case and it will be a part of the proceedings, and I will sign a decree in accordance with what I have said.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 625

In the Matter of

THE PETITION OF HANS-OLA T. MALMSTEDT
FOR THE ADOPTION OF A MINOR

Hans-Ola T. Malmstedt, Petitioner

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1966

No. 625

In the Matter of

THE PETITION OF HANS-OLA T. MALMSTEDT FOR THE ADOPTION OF A MINOR

Hans-Ola T. Malmstedt, Petitioner

REPLY BRIEF OF PETITIONER

Respondent Mother and Respondent Church Mission raise three arguments in opposition to the Petition for Certiorari filed by Petitioner-father. They are:

1. that constitutional question now pleaded by the Petitioner was not raised below, (Res. Br. 5);

2. that Maryland's statutory requirements for denial of an adoption petition have been met throughout (Res. Br. 6); and

3. that the denial of this adoption simply reflected Maryland's application of the "best interests" rule to this father's petition and transgressed no constitutionally protected rights, (Res. Br. 7)

Petitioner will reply briefly to each contention.

1. The constitutional question in this case was never raised until Maryland's Court of Appeals converted the "best interests" test in adoption cases into a threshold disqualification of natural fathers to seek adoption of this illegitimate child. Moreover, Petitioner's constitutional standing under the case law, as it stood as of briefing, and argument below, was made clear to the Maryland Court of Appeals.

In the history of this case the emergence of the precise constitutional issues relied on by the Petitioner occurred only when the Maryland Court of Appeals entered its judgment and opinion. Only at that time did the denial of this father's Petition go beyond the facts of the case and beyond a simple exercise of judicial discretion.

The trial Court's decree, upon which its judgment must rest, contained the following findings:

(at E-96)

> "4. That the Intervenor, [*] has not consented to the Petition of the Petitioner and has opposed said Petition;"
>
> "5. That the consent of the Intervenor [*] was not withheld contrary to the best interests of the child."

Thus, the determinant for the trial Court was the absence of the consent of the mother. In determining that the mother had not unreasonably withheld her consent, the trial Court, in both its oral and written opinion, recited its conclusions that the Respondent Mother had given careful consideration to this Petition and had rational bases for opposing it.

* The name of the Respondent-Mother is omitted.

(at E-93)

> "1. Now it would appear to the Court that the mother of this child gave careful consideration as to what she was going to do with the child, and what would be for the best interest of this child, before she placed the child with the Church Mission of Help of the Diocese of Maryland, Inc., with the intention that they should be granted guardianship with the right of adoption, and it was her considered judgment, and she is a young girl, twenty years of age, that it would be best for all parties concerned that this child be adopted by a responsible, and, as she stated, "young couple" who could give it love, affection and raise it as their own child, while it is quite young rather than have the child know the father and know that the mother had determined that she did not want to keep the child, and that it had been turned over by the Court to the father, because the mother did not want the child; and I think that would be a very unusual situation and one that certainly would not be in the best interest of this poor child.

and

(at E-99)

> Her decision in this case was made after careful consideration as to what, in her opinion at least, would be for the best interests of the child.

and

(at E-99

> In the instant case the mother has never given her consent to the adoption of her child by the Petitioner and has refused

to do so because, in her opinion, it is not in the best interest of the child."

and

(at E-100)

> As stated by the witness Mrs. Johns, a child should be placed in a family where there is a father and mother to give the child a normal family experience and who would love and raise her as their own. Here the child, knowing that she was adopted by an illegitimate father would want to know why her mother did not want her, which, in reality, would be manifestly unfair to the mother. The plan as thought out by the mother for the child's adoption appears to be the best suited to insure the child's welfare, best interests and future happiness.

For the trial Court, therefore, the issue was entirely the matter of the Respondent Mother's [redacted] and whether it had a rational, reasonable basis. The Court found that she did. It is submitted that this decision skirted the constitutional pitfall that the majority of the Court of Appeals so squarely raised: the threshold disqualification of the father because of the fact of illegitimacy. Rather, the trial Court simply ascertained that the Respondent Mother's consent had been withheld and that she had reasonable grounds for doing so.

It is true that the language quoted from E-100, *supra*, inferentially raises the spectre of raising the child as an illegitimate child as the ground for both the Respondent Mother's opposition and the trial Court's concurrence in it. It is submitted, however, that a full reading of the decree and both the oral and

written opinions of the trial Court wholly diffused this point, subordinating it to the primary issue of the reasonableness of the mother's objection.

Nevertheless, Petitioner felt that it was necessary to demonstrate to the Court of Appeals that he had certain constitutional standing which could not be ignored simply because (1) the Maryland statute did not require that he be notified of his child's adoption, and (2) the child's mother had been given a veto against his adoption of his infant girl. Accordingly, at pages 34-36 of Petitioner's brief to the *Court of Appeals* (which is attached to the sealed record filed in this Court). Petitioner argued that *Armstrong v. Manzo*, 380 U.S.545, gave him constitutional protection. Petitioner there argued:

(at 35-36)

> "The appellant in this case like Mr. Armstrong is the parent and natural guardian of this child. Art. 72A, Section 1, Art. 1, 16, Section 66 and 66H, and, as we pointed out above, he has a right to priority as to custody over all but the mother so long as he is not unfit.
>
> "It is exactly these kinds of rights with which the Supreme Court was concerned in *Armstrong* in the earlier case of *May v. Anderson*, 345 U.S. 528, 533, 97 L. Ed. 1221, 1226, 73 S. Ct. 840."

This was as far as Petitioner could go because Maryland's discrimination against him as a Petitioner for adoption was far from clear. When briefing and argument took place before the Court of Appeals, the very most that could be said was that the unequal application of the Maryland adoption laws was lurking

about the periphery of the case. And so Petitioner noted his constitutional standing before the Court of Appeals.

Moreover, when briefing and argument took place below, it was not at all clear that this Court would include within the constitutionally - protected relationship of father and child the tie between the natural father and his *illegitimate* child. The child in *Armstrong v. Manzo, supra,* decided before the present case was heard below, was born *in wedlock* Petitioner's briefs were filed below on January 21, 1966 (his Main Brief) and on April 7, 1966. Argument was held before the Court of Appeals on April 26, 1966. It was not until this Court ruled in *Selman v. Phillips*. 384 U.S. 210, on *May 16, 1966,* that Petitioner could urge on *any* Court that the relationship between a natural father and his illegitimate child had been granted constitutional protection of any kind. Accordingly, Petitioner submits that he has asserted the constitutional grounds available to him in a manner appropriate to the issues as formed below.

2. Petitioner does not contest that the Maryland Court of Appeals did apply the *form* of the State's standard for adoption, that of "best interests of the child", in denying the Petitioner-father's Petition below. But this Court can and should, it is submitted, look beyond the repetition of these magic words by the Court below to its real and explicitly stated basis of decision (See pp. 7-8, *infra*) in order to determine if constitutional injury has occurred.

Moreover, blind and automatic adherence to the various rubrics that recur in custody and adoption cases raises certain dangers The "best interests of the child test" – most often applied in these cases – is itself capable of misuse if all other rights and considerations in these often-complex situations are

ignored. Empowering a Court to act without restriction "in the child's best interest" gives it license to invade the parental relationship at will if it happens to feel the child would benefit more elsewhere.[1] Thus the rubrics and maxims — including the "best interest of the child" standard — must be tempered with consideration of the various individual rights involved. A father's — *this* father's — entitlement to constitutional equal protection is just such a consideration. Indeed, it is not articulating an advanced view to state that modern medical science's recognition of the special emotional needs of illegitimate children should be reflected in judicially recognized rights possessed *by these children*. These rights cannot be airily dismissed or arbitrarily rejected out of moral censure of the parents or of illegitimacy overall. Illegitimate children, all illegitimate children, suffer hurts, as the child psychiatrist in this case testified without opposition, which in certain instances can be best and most effectively ameliorated by their own natural parents.[2] This, certainly, forms the kernal of an entitlement possessed by any illegitimate child. This entitlement was ignored by the Court below when it refused to judge the fitness of this father and converted the "best interests" rubric into an all-empowering writ, blind to both the rights of the parent and those of the child.

3. Both Respondents contend that the Petitioner raises issues not involved in the case. It is contended by them that *if* the best interests of the child would have been served by this adoption, the Petition would have been granted. To this, Petitioner simply asks this Court to examine the opinion below and determine

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[1] See the recent note at 79 Harvard Law Review 1710

[2] See E.54 through 66

why the Maryland Court of Appeals held that this adoption was not in the best interest of the child. The answer is plain. The Petitioner's fitness to raise his child was deemed irrelevant. The majority stated:

(Pet. App. A-2)

> The appellant seems to think that the trial judge found him unfit to raise a child. This is not true. It was unnecessary for the judge to reach that question, and we do not reach it either. Our only question is to determine what the welfare of the child demands.

It was because the child was to be raised by the Petitioner as an illegitimate child, that the majority acted to separate them permanently:

(Pet. App. A-4)

> The facts, we think, speak for themselves, and it would be rather useless to point out in detail all of the reasons that sustain the Chancellor's ruling. It should be apparent to all that through infancy, adolescence, and young ladyhood it will be decidedly more advantageous to be raised in a normal, wholesome home with a mother and a father, than to be reared as an illegitimate child by the father alone, with the many potential, possible complexities and problems attendant to such a rearing. It is obvious to us that the facts impelled the Chancellor's holding; consequently, we not only find no reason to disturb his ruling, but state that had it been otherwise, we would have had to change it.

The majority felt that regardless of the blood tie, it had devised a better future for Petitioner's daughter:

(Pet. App. A-4)

> If the action of the Chancellor be sustained, the agency is ready to proceed with a normal, customary adoption proceeding, whereby the child will be placed in a suitable home with a father and a mother.

There is the definition of "best interest", as Maryland conceives of it, in a situation where a father seeks only to establish his fitness to care for his infant child.

Respondents then contend that no unwarranted state interference with the blood tie is involved herein, since:

> "the relationship is analogous to a charge in a divorce case that awarding custody to one parent is an interference with the relationship between the child and the other parent." (Res. Br. 8)

But that is precisely Petitioner's point. If this father were before the Maryland Courts in a divorce case and custody of his child were at stake — and he were opposed by unknown and undesignated strangers — he would be entitled to the very adjudication of his fitness as a parent that Maryland has denied him in this case. It is *this* denial that so graphically demonstrates the unequal application of the Maryland adoption laws. Under the formulation of the majority of Maryland's Court of Appeals, this Petitioner is uniquely and peculiarly barred — as no other Petitioner would be — from raising his own daughter because he is her father and because she was born out of wedlock.

Petitioner asserts no statutory right to custody of his child, as Respondents contend (Res. Br. 8). Rather, he asks only even-handed administration of

the State's adoption laws. He seeks no change in the traditional weighing — by the trial judge — of the best interests of the child as a determinant in adjudicating what the child's future shall be. But he points to Maryland's defiance of the blood tie in favor of sealing off a child from her unwed father as clear indication that Maryland's application of that standard has gone awry, constitutional awry. In sum, Petitioner argues only that he has a constitutional right to seek his child in parity with all other natural fathers.

In this view he is supported not alone by constitutional sanction but also by the clear pronouncements of the Maryland legislature which very much favors preservation of the very blood ties which the majority of Maryland's high court has severed.

CONCLUSION

Wherefore, the Petitioner prays that this Court review and reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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